STATE OF MICHIGAN

COURT OF APPEALS

RONNIE L. MYERS, and MARY MYERS,

Plaintiffs-Appellees,

v

MUFFLER MAN SUPPLY COMPANY,

Defendant/Cross-Plaintiff-Appellant,

and

NEVADA EQUIPMENT LIQUIDATING, f/k/a NEVADA EQUIPMENT, INC., MICHIGAN TRACTOR & MACHINERY COMPANY, d/b/a MICHIGAN CAT AGGREGATE DIVISION, and CULVER CONSTRUCTION, INC., f/k/a CULVER CONSULTING, INC.,

Defendants,

and

POWER SCREEN USA, L.L.C., d/b/a SIMPLICITY ENGINEERING, INC., D & L EQUIPMENT, INC., and SUBLET CONTRACTORS, INC.,

Defendants/Cross-Defendants.

UNPUBLISHED
September 23, 2008

No. 277542
Genesee Circuit Court
LC No. 04-079144-NP

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant Muffler Man Supply Company ("defendant") appeals by leave granted from an order denying its motion for summary disposition against plaintiffs Ronnie Myers and Mary Myers[1] under MCR 2.116(C)(10). We reverse.

This case arises from an amputation injury plaintiff suffered when he reached into a conveyor to clean it, without completely turning it off. He was an employee of Clio Sand & Soil, Inc. ("Clio Sand"). The conveyor was part of a large outdoor machine that sifts and shakes debris out of soil or sand. Plaintiffs filed this action against several defendants, but only their negligence claim against defendant is at issue in this appeal. Plaintiffs allege that defendant voluntarily undertook to maintain and repair the machine and to train Clio Sand's employees, but was negligent in carrying out those duties.

Defendant first argues that the trial court erred in finding that there was a question of fact whether it continued to owe a voluntarily-assumed duty to maintain and repair the conveyor and to train Clio Sand's employees.

A trial court's decision on a motion for summary disposition is reviewed de novo. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether there is a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

"It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages." *Fultz v Union Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). Because there can be no tort liability unless the defendant owes the plaintiff a duty, the existence of a duty is a threshold question of law to be decided by the trial court.[2] *Id*.

As observed in *Fultz*, *supra* at 464, Michigan has adopted § 324A of the Restatement of Torts, 2d (the "Restatement"), which provides:

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[1] Because Mary Myers's loss of consortium claim is derivative, we use the singular term "plaintiff" to refer to Ronnie Myers only.

[2] "In determining whether a duty exists, courts look to different variables, including: foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach." *Brown v Michigan Bell Tel, Inc, (On Remand)*, 225 Mich App 617, 622-623; 572 NW2d 33 (1997), rev'd on other grounds 459 Mich 874 (1998). In this case, there is no relationship between plaintiff and defendant, but defendant has conceded for summary disposition purposes that it initially voluntarily assumed a duty of care.

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a *third person* or his things, is subject to liability *to the third person* for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or
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> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. [Emphasis added.]

Michigan has also adopted § 323 of the Restatement, see *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 401-405; 418 NW2d 478 (1988), and that section provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of *the other's person* or his things, is subject to liability *to the other* for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking. [Emphasis added.]

Under either section, "[i]f one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Fultz, supra* at 465; see also *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205-206; 544 NW2d 727 (1996); *Sponkowski v Ingham Co Rd Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986).

Both comment a to § 323 and comment b to § 324A state that these sections apply when the harm results from the defendant's negligent conduct in performing the voluntary undertaking, the defendant's failure to exercise reasonable care to complete it, *or the defendant's failure to protect the recipient of the services when the defendant discontinues it*. In the present case, defendant has conceded for summary disposition purposes that it voluntarily undertook to repair and maintain the conveyor, and to train Clio Sand's employees, through its employee, Brian Helton. Defendant, however, argues that it discontinued those duties approximately three years before plaintiff's accident.

Concerning the discontinuation of a service voluntarily undertaken, comment c to § 323 states:

> *Termination of services.* The fact that the actor gratuitously starts to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his

> power to aid and protect the other. *The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was before the actor attempted to aid him.* His motives in discontinuing the services are immaterial. It is not necessary for him to justify his failure to continue the services by providing a privilege to do so, based upon his private concerns which would suffer from the continuation of the service. *He may without liability discontinue the services through mere caprice*, or because of a personal dislike or enmity toward the other.
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> *Where, however, the actor's assistance has put the other in a worse position than he was before*, either because the actual danger of harm has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance, *the actor is not free to discontinue his services where a reasonable man would not do so*. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated. [Emphasis added.]

The illustration accompanying the comment refers to an employee who is sent home ill in a company delivery wagon, but her street is unpaved and in poor condition, so the driver refuses to take her all the way home, requiring her to walk in the rain and causing her to become sicker. In that case, the company would be liable for the increase in the employee's illness.

While § 324A does not contain a comment tracking the language quoted above, its comment c states:

> *Increasing the risk.* If the actor's negligent performance of his undertaking results in increasing the risk of harm to a third person, the fact that he is acting under a contract or a gratuitous agreement with another will not prevent his liability to the third person. Clause (b) finds common application in cases of the negligent performance of their duties by employees of independent contractors, which creates or increases a risk of harm to third persons. Thus, where the negligence of a train dispatcher, a telegraph operator, and an engineer who are rendering services to a railroad company results in a train wreck, each is subject to liability to the injured passengers.

This illustration indicates that where the employee of a contractor undertakes to repair a light fixture in a grocery store, but fails to properly re-attach it and it falls on a customer, the electrical contractor may be liable to the customer.

In the present case, defendant did not undertake to perform any duties directly for plaintiff. Rather, defendant undertook to perform services for Clio Sand, which were allegedly necessary for the protection of third parties, i.e., Clio Sand's employees (including plaintiff). Thus, this case is governed by § 324A (liability to third persons), rather than § 323 (liability to others). But, the two sections are so similar, and both address the circumstances under which discontinuing voluntary services may give rise to liability; consequently, the principles embodied

in comment c to § 323 can be applied to cases governed by § 324A, including the present case. See *Schanz*, *supra* at 403 and n 3.

Moreover, Michigan cases have held that a person who voluntarily assumes the duty to perform repairs is liable for resulting injuries "only if [the repairs] increased the hazard rather than decreased the hazard in issue." *Haaksma v City of Grand Rapids*, 247 Mich App 44, 57; 634 NW2d 390 (2001). A volunteer who has not increased the hazard has "no continuing duty to inspect . . . , to make continuing repairs, or to repair the hazard again . . . ." *Id*. at 48.

In the present case, we conclude that defendant voluntarily undertook two distinct duties, first to repair and maintain the conveyor, and second, to train Clio Sand's employees.

In count V of its last amended complaint, plaintiffs alleged that defendant was negligent in removing the tail drum guard and scraper, failing to replace the guard and scraper, allowing the conveyor to remain in use and disrepair without a guard and scraper, and failing to inspect and repair the conveyor. Plaintiffs also alleged that defendant was negligent in failing to properly instruct and train Clio Sand's employees, failing to disseminate operator's and other manuals, and failing to supervise the operation of the conveyor. Distilling these claims to their essence, plaintiffs allege that defendant was negligent in removing and failing to replace the guard and scraper and in failing to train and supervise Clio Sand's employees.

By removing and failing to replace the guard and scraper, defendant increased the likelihood that Clio Sand's employees might inadvertently make contact with the rotating tail drum. The failure to replace the guard and scraper also increased the likelihood of debris entering the conveyor mechanism, requiring Clio Sand's employees to clean the tail drum area more frequently. Thus, in the course of voluntarily repairing and maintaining the conveyor, defendant placed Clio Sand in a worse position than it was originally. Accordingly, defendant may be liable for harm resulting from its failure to exercise reasonable care to complete the voluntarily-assumed task of repairing and maintaining the conveyor and for harm resulting from its failure to protect Clio Sand's employees when it chose to discontinue the task.

Conversely, by ceasing to train and supervise Clio Sand's employees, defendant did not place Clio Sand in any worse position than it was in before. Rather, the job of training and supervising Clio Sand's employees simply reverted to Clio Sand. Accordingly, defendant was free to discontinue this voluntarily-assumed task, and it may not be liable for harm resulting from any subsequent lack of training and supervision.

For these reasons, the trial court erred in finding that defendant owed plaintiff a duty to train and supervise Clio Sand's employees but did not err in finding that defendant owed plaintiff a duty to maintain and repair the conveyor.

Defendant further argues that it was entitled to summary disposition because its alleged negligence was not the proximate cause of plaintiff's injury. Defendant argues that the machine's design defects were the proximate cause of plaintiff's injury; therefore, it could not have proximately caused plaintiff's injury. We agree that defendant was entitled to summary disposition on the issue of proximate cause, but for different reasons.

"To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). It is not sufficient to show a mere possibility that a defendant's negligence may have been the cause of plaintiff's damages. *Id*. at 648, n 12 (citations omitted).

To establish legal cause or "proximate cause", "the plaintiff must show that it was foreseeable that the defendant's conduct 'may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable.'" *Id*. at 648, quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). In other words, legal cause "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). "A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue." *Id*.

To prove cause in fact, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id*. at 164-165. "'"A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."'" *Id.* at 165, quoting *Mulholland v DEC Int'l*, 432 Mich 395, 416, n 18; 443 NW2d 340 (1989), quoting Prosser & Keeton, Torts (5th ed), § 41, p 269. Additionally, where several factors combine to produce an injury, the plaintiff must establish it was more likely than not that the defendant's negligence was a *substantial factor* in bringing about the plaintiff's injuries. *Weymers*, *supra* at 649 n 16; *Skinner*, *supra* at 165 n 8.

In the present case, defendant argues that plaintiff's injuries were proximately caused by the conveyor's design defects, including the fact that it lacked an interlocking guard, a backstop, and an alarm. Defendant argues that plaintiff's injuries were also caused by Clio Sand's failure to establish an adequate lock-out procedure for cleaning the conveyor.

We conclude that defendant's design defect analysis is inapposite. The pertinent inquiry is not whether various design defects might be a proximate cause of plaintiff's injury, but whether plaintiffs can sufficiently show that *defendant's conduct* was a proximate cause of plaintiff's injuries. The preexisting design of the machine provides context for this analysis, but it cannot absolve defendant from liability for damages it proximately caused by its subsequent negligence.

Defendant does not dispute that the conveyor was equipped with a guard and a scraper when it was purchased in 1997. Both pieces were absent by 1998 when plaintiff's eventual supervisor was hired. By 1999, when Helton left, defendant stopped maintaining and repairing the conveyor and ceased training Clio Sand's employees. Clio Sand failed to replace the guard and the scraper, and apparently failed to train its employees.

Still, the evidence showed that because the conveyor was equipped with a mesh screen, dirt would enter the mechanism even when the guard was in place. In fact, defendant's first manager testified to his procedure in cleaning the tail drum area of the conveyor, including bolting the guard back on the machine. Moreover, it is undisputed that in order to clean the conveyor mechanism, one had to remove the tail drum guard.

As discussed previously, defendant's alleged negligence in failing to replace the guard and scraper created a hazard of accidental contact and contributed to the need for more frequent cleanings. Moreover, under any scenario, the machine still needed to be cleaned occasionally, requiring the guard to be removed. Thus, even if the guard and the scraper had been on the machine, plaintiff would have had to remove the guard in order to clean the mechanism, thereby exposing himself to the danger posed by the tail drum. Therefore, plaintiffs cannot show that, but for defendant's alleged negligence in failing to replace the guard and scraper, plaintiff's injuries would not have occurred.

Given the conveyor's design, the accident could have been prevented only if plaintiff always stopped the engine before attempting to clean the conveyor mechanism. Defendant's alleged negligence for failing to replace the guard and scraper did not create or contribute to the hazard from which harm resulted, i.e., cleaning the machine without first turning off the engine.

Plaintiff alleges that he was negligently trained because he was never specifically instructed to turn off the engine before cleaning the conveyor; however, it is undisputed that defendant did not train plaintiff. He was trained, if at all, by Clio Sand's employees, after defendant relinquished its duties. As discussed previously, by abandoning the task of training and supervising Clio Sand's employees, defendant did not place Clio Sand in a worse position than it was in before. Therefore, defendant cannot be held liable for Clio Sand's alleged failure to properly train and supervise its employees.

Because defendant did not owe a continuing duty to train Clio Sand's employees, and its alleged negligence in failing to replace the guard and scraper was not the proximate cause of plaintiff's injuries, the trial court erred in denying defendant's motion for summary disposition. In light of this decision, it is unnecessary to consider plaintiffs' remaining issues on appeal.

We reverse.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot